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*SECUNDUM PROBATA OR SECUNDUM
VERITATEM? REMARKS SURROUNDING
PAUL OF WORCZYN'S COMMENTARY
ON THE NICOMACHEAN ETHICS*
(BOOK 5, QUESTION 40)¹

In accordance with testimonies and evidences presented, or in accordance with the truth: how should a judge pronounce his sentence? This question puts into relief a difficulty hidden in the complex relationships between the indispensably personal, private or simply human nature of the judge and the impersonal, public and highly formal nature of law and court procedure. Law is, first of all, expected to guarantee equity in the treatment of the parties involved in a particular case. One of the main threats to this equity seems to be the arbitrariness of the judge delegated to examine the case or — what is worse — the partiality of his sentence due to his private presuppositions and prejudices. One of the effective remedies to judicial arbitrariness seems to be the judge's fidelity to the rules and procedures determined by law. Accordingly, the judge should minimize the influence of his private opinions on the case, since he acts on behalf of the equal, impersonal and consequently impartial articles of the law. The law prescribes, generally, that a sentence be based on the testimonies and evidences provided by the parties of a case; the law does this precisely to eliminate the judge's arbitrariness. The question is, what should be done when witnesses lie or when one party presents false testimonies? In such a case, should the judge follow the general, formal rule prescribing the acceptance of the documents and testimonies provided, which would endanger the justice of his sentence, or, instead, should he violate formal procedure to preserve justice, taking into account his private opinion on the witnesses and evidence? The introduction of private

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opinion into the procedure, which can safeguard justice, is supposed to be at odds with the essence of law, especially with the equity ensured by the formal and impersonal character of a judge's actions.

I became aware of this particular *aporia* while reading Paul of Worczyn's *Commentary on Aristotle's Nicomachean Ethics*.² In Book 5, Paul formulates the problem openly. He devotes a separate question to its solution.³ As frequently happens with late medieval texts, Paul's question makes extensive use of the classics of medieval thought. Moreover, Paul reveals that one of his intellectual masters is Thomas Aquinas. Aquinas is presented at the very beginning of the question as a proponent of the predominance of testimonies and evidences over the judge's true but private opinion. Another such master is Gerald Odonis, who is not named but is easily recognizable in the paraphrases of his work incorporated by Paul.

I. THOMAS AQUINAS

Thomas deals with the above-mentioned problem once, in his *Summa theologiae*, in an article devoted directly to it: *Whether it is lawful for the judge to pronounce judgment against the truth that he knows, on account of evidence to the contrary* from Question 67,⁴ which analyses what Aquinas calls vices opposed to justice, relative to words pronounced by the judge; it belongs to a longer series of questions dealing with the problems caused by inserting the human element into the functioning of the law. Thomas' article has not been a popular topic among scholars who specialize in his ethics, but his solution to the problem has been noted

²Paul's *Commentary*, completed in 1424, is perceived by Polish scholars as the most outstanding accomplishment of teaching in moralities produced in the first decades of the activity of the University of Cracow. Cf. J. REBETA, *Komentarz Pawła z Worczyna do Etyki nikomachejskiej z 1424 roku. Zarys problematyki filozoficzno-społecznej*, Wrocław – Warszawa – Kraków 1970 (Monografie z Dziejów Nauki i Techniki, 61), p. 161; J.B. KOROLEC, *Filozofia moralna*, Wrocław – Warszawa – Kraków – Gdańsk 1980 (Dzieje filozofii średniowiecznej w Polsce, 7), pp. 223sq. I base my acquaintance with Paul's work on manuscript 720, conserved in the Jagiellonian Library. The question occupies ff. 140rb–141rb.

³The commentary on Book 5, like the original text, is devoted to justice. Apart from terminological clarifications, definitions and an elucidation of the distinction between commutative and distributive justice — the set of questions that is self-evident in the commentary on Book 5 of Aristotle's *Ethics* — it deals also with the series of issues connected with the possible conflict (mentioned in the first paragraph) between the private/personal and public/formal spheres within the law.

⁴THOMAS DE AQUINO, *Summa theologiae*, II-II, 67, 2. As far as I know, this particular article from *Summa* has not yet been the subject of a thorough analysis.

and presented by specialists in legal history as a point of reference for the later development of the theory of law.⁵

Thomas begins with four arguments against judging in accordance with *probata* and against the truth. The first three are based on Scriptures that unambiguously advise readers to appeal directly to the truth. Argument 1 is based on Deuteronomy (17:9): “venies ad sacerdotem Levitici generis [...] qui indicabunt tibi iudicii veritatem” accompanied by an acknowledgement of the possibility of false testimonies that would release a judge from following them. Argument 2 combines Deuteronomy (1:17): “Dei iudicium est” with Romans (2:2): “iudicium Dei est secundum veritatem,” both of which are corroborated by Isaiah (11:3): “non secundum visionem oculorum iudicabit” and so on. Since humans should imitate God in their actions, they ought to prefer the truth to testimonies. Furthermore, as Argument 3 states, testimonies should not be taken into consideration at all, which is pointed out by the First Letter to Timothy (5:24): “Quorundam hominum peccata manifesta sunt, praecedentia ad iudicium.” The fourth argument takes as its starting point the etymology of the term *conscientia*: it derives from the *scientia* related to something that can be done. And since it is a sin to do anything against one’s conscience, a judge would commit a sin when formulating his sentence in opposition to his ‘conscience’ (in the sense of that word revealed by its etymology) of the truth.⁶ These arguments are counterbalanced by a citation attributed to Saint Augustine that says: “bonus iudex nihil ex arbitrio suo facit, sed secundum leges et iura pronuntiat.” Its direct source is most probably Gratian’s *Decretum*.⁷

⁵ Cf. e.g. J. DELANGLADE, *Le juge, serviteur de la loi ou gardien de la justice selon la tradition théologique*, “Revue de droit canonique” 10 (1960), pp. 141–164; W. DECOCK, *The Judge’s Conscience and the Protection of the Criminal Defendant: Moral Safeguards against Judicial Arbitrariness*, in: *From the Judge’s Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials*, ed. G. Martyn, A. Musson, H. Pihlajamäki, Berlin 2013 (Comparative Studies in Continental and Anglo-American Legal History, 34), pp. 61–95. Moreover, the birth of the maxim *iudex iudicare debet secundum allegata et probata* in the Middle Ages, and its afterlife in contemporary juridical systems, has been thoroughly analyzed in several places. To mention just a few: M. RADIN, *The Conscience of the Court*, “The Law Quarterly Review” 48 (1932), pp. 506–520; K.W. NÖRR, *Zur Stellung des Richters in gelehrten Prozeß der Frühzeit: Iudex secundum allegata non secundum conscientiam iudicat*, München 1967 (Münchener Universitätschriften. Reihe der Juristischen Fakultät, 2); J. PICÓ I JUNOY, *El juez y la prueba. Estudio de la errónea recepción del brocardo iudex iudicare debet secundum allegata et probata, non secundum conscientiam y su repercusión actual*, Barcelona 2007; J.Q. WHITMANN, *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial*, New Haven – London 2008.

⁶ THOMAS DE AQUINO, *Summa theologiae*, II–II, 67, 2, 1–4.

⁷ *Ibidem*, sc. 1; GRATIANUS, *Decretum*, II, causa 3, qu. 7, can. 4 (Friedberg I, col. 527) (= *Corpus Iuris Canonici*, ed. Ae. Richter, Ae. Friedberg, Lipsiae², 1922) based on AMBROSIUS, *In Psalmum 118*, 156, sermo 20 (PL 15, 1571).

Aquinas' solution to the problem assumes, as he demonstrates earlier,⁸ that the judge must perform all actions as a representative of the public power, not as a private person. Therefore, he should not take into consideration what he personally knows; he should restrain himself to his knowledge as a public person. The judge's public knowledge consists of two parts, of which one is universal, i.e., knowledge of the laws, divine as well as human, and the other particular, i.e., referring to the particular case to the examination of which the judge is delegated. The universal knowledge of the judge, namely of the rules of law, cannot be discussed. As for particular knowledge, two elements converge: (1) documents and testimonies supplied by the parties of the case and (2) what the judge knows as a private person. The latter must not dominate the former. Yet Aquinas warns at the end of the *corpus* of the question that, if the two are contrary to one another, the judge should take a closer and more diligent look into the case and try to discern the weaknesses of the suspected testimonies and documents.⁹

Against the arguments for judging according to the truth that are based on Scripture, Aquinas says that the biblical quotations he mentions are either misunderstood or refer to God's absolute ability to recognize the truth, which enables Him to judge according to His own power. This is not possible for a human being, who must judge in accordance with the power he receives from others as a public functionary. Similarly, the judge's private conscience should be modified when he acts as a representative of the people to exclude the influence of his private opinions on the case at hand.¹⁰

Thomas' reflections in the article under consideration are in consonance with his solution to the question *Whether it is allowed in some cases to kill an innocent*.¹¹ Aquinas there presents, as an argument justifying killing an innocent, the following reasoning: what happens in accordance with *ordo iustitiae* is not a sin; *ordo iustitiae* authorizes the judge to sentence to death a defendant whom he knows to be innocent and accused by false witnesses. Although Aquinas generally excludes any justification for killing an innocent in the *corpus* of the

⁸ THOMAS DE AQUINO, *Summa theologiae*, II-II, 60, 1, corp.: "iudicium proprie nominat actum iudicis in quantum iudex est."

⁹ *Ibidem*, II-II, 67, 2, corp.: „iudicare pertinet ad iudicem secundum quod fungitur publica potestate. Et ideo informari debet in iudicando non secundum id quod ipse novit tanquam privata persona, sed secundum id quod sibi innotescit tanquam personae publicae. Hoc autem innotescit sibi et in communi, et in particulari. In communi quidem, per leges publicas vel divinas vel humanas, contra quas nullas probationes admittere debet. In particulari autem negotio aliquo, per instrumenta et testes et alia huiusmodi legitima documenta quae debet sequi in iudicando magis quam id quod ipse novit tanquam privata persona. Ex quo tamen ad hoc adiuvari potest ut districtius discutiat probationes inductas, ut possit earum defectum investigare. Quod si eas non possit de iure repellere, debet, sicut dictum est, eas in iudicando sequi.”

¹⁰ *Ibidem*, ad 1 – ad 4.

¹¹ *Ibidem*, II-II, 64, 6, 3.

article,¹² in answering the quoted argument he says that, nonetheless, a judge convinced about innocence of a defendant should diligently examine the witnesses to find an opportunity to release him. If he cannot uncover such a possibility, he should then refer the case to his superior. If the judge cannot do that, however, he is then allowed to condemn an innocent, because it is not he who condemns but the false witnesses. The solution is different if a servant of the judge is concerned. On the one hand, the servant is not obliged to follow a sentence pronounced by his superior when it involves a manifest fault; on the other, if a fault is not manifest, a servant does not commit a sin while following the sentence because it is not his task to discuss a sentence pronounced by his superior.¹³ It is worth noting that, although the motif of sentencing the innocent is not treated in separate questions by Paul or by Gerald, it is incorporated into their discussions of judging according to testimonies and evidence.

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Surely Thomas' text should be perceived as his comment upon the *Streit der Fakultäten*, in which one side is occupied by theologians represented by the arguments *pro*, based on scriptural citations, while the other is dominated by Gratian, the chief master of the jurists quoted in the *sed contra* argument. Thomas obviously sides with the jurists. Aquinas' standpoint is clear and unambiguous: he opts for respect for the formal procedures prescribed by law against the judge's private opinion. First, the *corpus* of the question is indeed a defense of Gratian's position. Second, the main presupposition of his argumentation, namely the public character of the function performed by the judge, is also traceable in contemporary legal literature: it resembles the distinction coined by Azo between the judge as a private person and the judge as actually performing his function.¹⁴ Thomas emphasizes the sovereignty of law over the judge who applies it to a particular case, probably because he was convinced that the arbitrariness of the judge is a more dangerous menace to justice than anything else. Nonetheless, Aquinas warns against an uncritical credulousness of doubtful evidence. The position he espouses makes him wary of using the Bible as a source of arguments for a solution opposed to his own. In his answers, he expresses his distance from the arguments formulated at the beginning of the article. Aquinas' respect for the law and its articles prompted Delanglade to label his position 'legalist,' and this label was commonly accepted by legal historians; correspondingly, the opposite opinion was called 'anti-legalist.'¹⁵

¹² *Ibidem*, corp.

¹³ *Ibidem*, ad 3.

¹⁴ K.W. NÖRR, *Zur Stellung des Richters*, p. 32.

¹⁵ J. DELANGLADE, *Le juge, serviteur de la loi*, p. 145sqq.

Legal historians also stress another element that affects opinions about the nature of law and the profession of the judge, namely the judge's *moral* responsibility for the sentence he pronounces. A medieval judge who knew that he was condemning an innocent defendant to death might fear that he was putting his own salvation at risk. Therefore, Thomas' text, as well as jurists' common standpoint, can be interpreted as a means of freeing judges from an overwhelming fear of loss of salvation, which might paralyze them in the performance of their profession.¹⁶

2. GERALD ODONIS

Another side of the discussion, as presented by Paul of Worczyn, is represented by Gerald Odonis and his *Commentary on Nicomachean Ethics*,¹⁷ where, in Book 5, Question 19, he asks, *Utrum iudici liceat contra veritatem sibi notam iudicare sequendo proposita et probata*. The question is loosely connected with Aristotle's text. Indeed, it is merely associated with a paragraph of Chapter 9 of Book 5 (1136b 33 – 1137a 4), where the Stagirite speaks about an ignorant judge who pronounces a sentence. Therefore, it is not surprising that the question is absent in the majority of commentaries on the *Nicomachean Ethics*. I have found it only in Gerald's and Paul's works.¹⁸

¹⁶J. Q. WHITMANN, *The Origins of Reasonable Doubt*, p. 91sqq.

¹⁷Gerald Odonis (OFM, † 1349), Doctor Moralis, was an eminent figure among the Franciscan Friars in the first half of the 14th century. He studied and taught in Paris. In 1329, he was nominated as Minister General of the order; he took part in all important spiritual and intellectual activities of his order. He is the author of numerous theological and philosophical works. His *Commentary on the Nicomachean Ethics*, dated between 1320 and 1329, combines literary exposition of the text with questions dealing with some issues that were interesting for him and his audience but not necessarily directly connected to Aristotle's inquiries. The *Commentary* has been analyzed in several studies, of which three are the most comprehensive: J. WELSH, *Some relationships between Gerald Odo's and John Buridan's Commentaries on Aristotle's Ethics*, "Franciscan Studies" 35 (1975), pp. 237–275; B. KENT, *Aristotle and the Franciscans: Gerard Odonis' Commentary on the Nicomachean Ethics*, PhD Dissertation, Columbia University 1984; C. PORTER, *Gerald Odonis' Commentary on the Nicomachean Ethics: A Discussion of the Manuscripts and General Survey*, in: *Gerald Odonis. Doctor Moralis and Franciscan Minister General: Studies in Honour of L.M. de Rijk*, ed. W. Duba, Ch.D. Schabel, Leiden – Boston 2009 (= "Vivarium" 47/2–3 (2009)). No one until now has paid attention to the question analyzed here.

¹⁸I examined all printed editions of the *Ethics* commentaries, including those by Giles of Orléans and Richard Kilvington. The former became known to me thanks to an edition by J.B. Korolec and B. Chmielowska based on a Parisian manuscript (BNF, lat. 16089) deposited in the Department of the History of Ancient and Medieval Philosophy at the Institute of Philosophy and Sociology of the Polish Academy of Sciences; the latter is presented in an article by M. MICHAŁOWSKA, *Richard Kilvington's Quaestiones super libros Ethicorum*, "Bulletin de philosophie médiévale" 53 (2011), pp. 233–282.

Gerald's question begins with six arguments against judging in accordance with the truth when it is at odds with the testimonies and evidence provided. First, the judge ought to pronounce his sentence in agreement with the knowledge he has as a public person, and that knowledge is based on proofs and testimonies. This argument is supported by an *auctoritas* taken from Gregory IX's *Decretales*.¹⁹ This is also Aquinas' main argument. The second argument boils down to an *auctoritas* from the *Decretum*, according to which the judge should judge 'as he hears,'²⁰ that is, according to the testimonies he heard. The third argument says that the judge should not allow his sentence to be influenced by his private opinion in cases in which the law does not allow a judge to exclude someone from the sacramental communion. And, as the *Decretum* says,²¹ the law forbids using a private opinion as a reason to excommunicate someone. The fourth argument asserts that the judge must respect what is defined as safe by law. On the basis of Deuteronomy (17:6): "in ore duorum vel trium peribit innocens," it assumes that the law allows the condemnation of the innocent. The fifth argument points to the prevalence of the *bonum commune* over the *bonum particulare*: the *bonum commune* is represented by the judge's knowledge as a public person, while the *particulare* is represented by his private knowledge. Finally, the sixth argument advises the judge to choose the lesser evil, which (in the case under consideration) means condemning an innocent person on the basis of the testimonies and evidence delivered in court rather than releasing him without proof of his innocence, since this second option would cause scandal. This argument is immediately objected to by Gerald, who says that it is probably better to provoke scandal than to act against the truth.²²

Then comes the main part of Gerald's considerations: the *corpus* of his question, consisting of two parts labeled by him 'the Answer' and 'the Advice.' The Answer is preceded by a distinction of the two kinds of knowledge accessible to

¹⁹ GERALDUS ODONIS, *Sententia et expositio cum quaestionibus super libros Ethicorum Aristotelis*, V, 19, 1 (Venetiis 1500, f. 114vb): "iudex tenetur iudicare secundum illam notitiam quam habet ut iudex non ut persona privata, nec secundum eam, quam habet in alio foro [...] [Gregorius IX, *Decretales*, I, tit. 31, cap. 2 (Friedberg II, col. 187)]. Sed iudex habet ut iudex hanc notitiam sibi factam per proposita et probata, non tamen illam quam habet ut persona privata, quare licet ei, immo tenetur iudicare secundum proposita et probata contra veritatem quam novit ut persona privata."

²⁰ GERALDUS ODONIS, *Expositio*, V, 19, 2 (f. 114vb); GRATIANUS, *Decretum*, II, causa 3, qu. 7, can. 4 (Friedberg I, col. 527, 21–22).

²¹ GRATIANUS, *Decretum*, II, causa 2, qu. 1, can. 18 (Friedberg I, col. 446–447); causa 6, qu. 2, can. 2 (Friedberg I, col. 561).

²² GERALDUS ODONIS, *Expositio*, V, 19, 3–6 (f. 114vb).

the judge, namely sure knowledge of vision and probable opinion.²³ The solution to the main question differs according to the kind of knowledge indicated.

If it is merely the judge's probable opinion that contradicts evidence and testimonies, he should pronounce his sentence according to that evidence and those testimonies. This is true for three reasons.²⁴

First, the judge is usually more likely to question the credibility of evidence and testimonies than a witness. Yet the doubts of a witness called by one party of a case and directed against another are not to be taken into consideration. Even less should the suspicions of the judge be considered. This argument is corroborated by the *Decretum*, where one can read that the judge's opinion is more sensitive to objections than a witness' testimony, which is why it is easier to find a thousand judges than one witness.²⁵

Second, no judge should follow, in his sentences, his own impressions and sentiments; yet impressions and sentiments do form the ultimate basis of suspicions and assumptions. Again, the major premise is borrowed from the *Decretales*.²⁶

The third argument is based on an analogy between law and logic: just as, in logic, topical or probable arguments are weaker than demonstrations, so, in law, unambiguous evidences cannot sufficiently be opposed by suspicions.²⁷

Gerald comments on this part of the *corpus*, saying that the real problem arises when one asks about a conflict between the sure knowledge of the judge and evidence. Thus he begins the central part of the entire question, which consists of five arguments for the dominance of the truth over evidence. First comes the scriptural argument. Exodus (23:2) orders: "ne sequeris turbam ad faciendum malum nec plurimorum acquiesces sententiae in iudicio ut a veritate devies." According to the Franciscan Master, the *auctoritas* is self-evident: it forbids the judge to deviate from the truth in any circumstance.²⁸

The second argues that, in deeds that are necessarily bound to evil, meaning deeds that are morally bad as such, it is impossible to avoid sin and act

²³ GERALDUS ODONIS, *Expositio*, V, 19, corp. (f. 114vb): „est notitia probabilis opinionis, praesumptionis vel suspicionis. Et est notitia certitudinalis visionis, puta cum vidit factum vel audivit dictum.”

²⁴ *Ibidem*: „iudex potest et debet iudicare contra illud quod ipse suspicatur, praesumit vel opinatur esse verum, dum tamen oppositum fuerit ei legitimo modo probatum.”

²⁵ Cf. GRATIANUS, *Decretum*, II, causa 3, qu. 5, can. 12 (Friedberg I, col. 517); causa 11, qu. 3, can. 37 (Friedberg I, col. 654): „iudex citius et ex leviori causa possit repelli quam testis.”

²⁶ GREGORIUS IX, *Decretales*, I, tit. 2, cap. 1 (Friedberg II, col. 7): „nemo in actionibus et iudiciis uti debet suo sensu.”

²⁷ GERALDUS ODONIS, *Expositio*, V, 19, corp. (f. 114vb–115ra).

²⁸ *Ibidem* (f. 115ra): „Secundam [...] conclusionem probo primo quidem auctoritate omnipotentis Dei, qui quaestionem istam expresse determinare videtur dicens: ‘ne sequeris turbam ad faciendum malum nec plurimorum acquiesces sententiae in iudicio ut a veritate devies’.”

rightly. This opinion is shared by the Philosopher and by Saint Augustine, as quoted in Peter Lombard's *Sentences*. The second premise states that a deliberate condemnation of an innocent belongs to the class of always-sinful actions. That the condemnation of an innocent is always sinful is affirmed again and explicitly in Exodus (23:7): "innocentem et iustum non occidas, quia adversor impium." Moreover, the Bible confirms that the condemnation of an innocent is at odds with the way natural truth and justice operates. Book Three of Esdras (4:36) says: "omnis terra veritatem invocat, caelum etiam ipsam benedicit et omnia opera moventur et tremunt veritatem et non est cum veritate quicquam iniquum."²⁹

The third argument asserts that the deliberate condemnation of an innocent by the judge could be justified by love of God, or the self-love of the judge, or by love of neighbor. But none of the kinds of love listed here can justify the condemnation of an innocent: neither love of God (because, as Bede asserts in the *Decretum*, he who disobeys the orders of truth and charity looses God, who is truth and charity); nor self-love (because it is better for someone to suffer for the truth than to receive flattery); nor the love of the neighbor (because condemnation involves only a temporary "damnation" for the innocent person, but for the judge brings spiritual damnation with eternal consequences, as Augustine argues).³⁰

²⁹ *Ibidem*: „illa quae confestim nominata <sunt> convoluta sunt cum malitia et quae secundum se sunt mala nullo modo contingit bene fieri vel recte dirigi. Sed in illis necesse est semper peccare et numquam recte agere, ut tradit expresse Philosophus supra libro II, cap. 6 [1107a 8–9] et Augustinus libro *De mendacio* [cap. 7, § 18 (CSEL 41, p. 489, 6–9)], ut diffuse probatur in *Sententiis*, libro II, dist. 40 [cap. un., 7 (Grottaferrata 1971, t. I, p. 559, 2–5)]. Ait enim Augustinus: ‘ea quae constat esse peccata nullo bono esse obtentu, nullo quasi bono fine, nulla velut bona intentione facienda sunt. Ea quippe opera hominum, sicut causas habuerint bonas, nunc sunt bona, nunc sunt mala’. Cum vero opera ipsa peccata sunt, quis dicat causis bonis esse facienda vel peccata non esse vel, quod absurdus est, iusta esse peccata quis hic dicat nisi qui res humanas moresque conatur et legem subvertere. Patet igitur quod ea quae convoluta sunt cum malitia et quae secundum se sunt mala, sunt et peccata, nullo modo contingit bene fieri. Sed innocentem et iustum scienter condemnare est secundum se malum et cum malitia convolutum, quare nullo modo potest bene fieri qualiscumque probatio intercedat.”

³⁰ *Ibidem*: „Si iustum condemnare liceat scienter iudici propter falsa testimonia, vel hoc licebit amore Dei, vel amore sui, vel amore proximi. Non quidem amore Dei, quia, ut ait Beda, qui veritatis et caritatis iussa spernunt Deum utique qui caritas et veritas est produnt, maxime cum non infirmitate vel ignorantia peccant [...] [GRATIANUS, *Decretum*, II, causa 11, qu. 3, can. 83, § 1 (Friedberg I, col. 666)]. Hoc autem modo <non> est in proposito. Item non amore sui, quia melius est homini pro veritate supplicium pati quam pro adulatione beneficium recipere [...] [GRATIANUS, *Decretum*, II, causa 11, qu. 3, can. 81 (Friedberg I, col. 665)]. Item nec amore proximi, quia unus, scilicet innocens, damnificatur temporaliter et alter spiritualiter, qui quamvis miser esset mala voluntate, ‘miserior tamen efficitur potestate qua desiderium malae voluntatis impletur’, ut ait Augustinus XIII *De Trinitate*, cap. 5 [CChSL 50, p. 392, 17–18].”

The fourth argument adopts a rule stemming from the *Decretum* that prescribes not to judge or condemn anyone before a true and just probation, that is, before all the testimonies and evidences are diligently analyzed and verified. Hence, if the judge does not possess any cogent proof against the truth known to him, since one truth cannot be opposed to another, he should follow the truth known to him and pronounce his sentence according to it.³¹

The fifth and last argument is based on a particular case, namely on the case in which a man must refuse to marry a woman whom he is forced to marry by a sentence based on the testimonies of witnesses: if a man knows that there exists an invincible obstacle to this marriage, he must follow his knowledge and conscience rather than the sentence. That case can be generalized and transformed into an article assessing that nothing, even a binding sentence of the judge, can force someone to commit an unjust deed. The case shows that a party to a case cannot act against his knowledge, and that the judge is actually freer in his actions than the party. So much less, then, is the judge obliged to follow evidence and testimonies he thinks are false.³²

The first observation that comes to mind while looking at Gerald's arguments is that their sequence is not accidental. Rather, they are ordered hierarchically: the first is based on the strongest authority, that is, on the Bible; the second, on the highest philosophical authority, that is, on Aristotle and on the commonly acknowledged theological authority of Saint Augustine as transmitted by Lombard's *Sentences*. The remaining arguments are weaker and stem from juridical texts and practice. Thus, it seems that the question is definitely solved with the tools of theology and philosophy. Then, after having solved the question, Gerald shows that even the *Decretum* offers premises that corroborate his solution. This is remarkable when one recalls that the arguments against his solution listed at the beginning of the question were based mostly on the *Decretum*. It seems as if Gerald first expresses his true opinion on theological and

³¹ *Ibidem*: „nullum ante iustam veramque probationem iudicare aut damnare debemus [...] [GRATIANUS, *Decretum*, II, causa 2, qu. 1, can. 20 (Friedberg I, col. 448); II, causa 30, qu. 5, can. 10 (Friedberg I, col. 1107)]. Si iudex contra veritatem sibi notam nullam probationem veram ante habere potuit, ut constat sibi, quia nullum verum est contra verum, cum omnia vera vero consonent, [...] quare nullum contra veritatem sibi notam iudex iudicare aut damnare debet.”

³² *Ibidem* (f. 115ra–rb): „Non plus potest cogi iudex per testium assertionem ad faciendam rem iniustam quam pars per probationem et sententiam. Argumentum ad hoc, quia tam magis est in potestate iudicis quam partis, ut dicit hic Philosophus [1136b 32sq]. Sed pars non potest cogi per probationem aliquam, nec per sententiam ad faciendum rem iniustam, quare nec iudex. Quod enim pars cogi non possit, patet in casu. Si enim alicui adiudicetur uxor propter probationem testium, quae in rei veritate uxor eius non est nec esse potest propter impedimentum notum isti et non iudici, iste certus de impedimento nec propter probationem, nec propter sententiam, nec propter excommunicationem recipiet illam in uxorem vel maritali affectione tractabit, quia nec debet secundum iura et sanctorum consilia.”

philosophical grounds and then counterbalances this with juridical arguments that show that the *Decretum* is not of one view in regard to judging on the basis of doubtful evidence.

In the second part of the *corpus* of the question, the Advice, Gerald anticipates a putative solution of the conflict between the judge's knowledge and testimonies and evidence. The solution consists in referring the cases in which testimonies and evidence contradict the judge's knowledge to another judge. The Doctor Moralis proposes that the judge generally should not refer such a case to another, because a bad action commissioned to another is equally bad as one committed by oneself. Hence, the judge is just as guilty of the condemnation of an innocent when he passes off that duty to a colleague as when he pronounces the sentence himself. This is so because, as Proclus teaches: the cause of a cause is also the cause of the caused. Gerald adds that the commissioning person is more responsible for the bad action than the person to whom it was commissioned.³³

Next, Gerald formulates a distinction that nuances his solution. He says that in looking into the problem one should take into consideration whether the judge whose knowledge is at odds with the testimonies and evidence has a superior judge over him or not. If the judge has a superior, he is to refer the case to this superior, accompanied with a scrupulous account of the testimonies and his own doubts. Then, if the superior forces the judge to pronounce a sentence, he should do it according to the truth. Second, if the judge has no superior, which is true for, for instance, the king of France, the pope or (in earlier times) the emperor of Rome, the judge should pronounce the sentence himself.³⁴

³³ *Ibidem* (f. 115rb): „Supposito quod iudex iudicare non debeat contra veritatem sibi notam, [...] generaliter consulo, quod causam taliter instructam nec committat, nec deleget alteri. Cuius ratio est, quia omne opus malum sicut est illicitum homini facere per se ipsum, <ita> [iustum] est ei illicitum facere per alterum, tum quia ille agit secundum iura, cuius auctoritate agitur, et ita per idem esset iudici condemnare innocentem per se ipsum vel per alterum, [...] [*Sextus Decretalium*, V, tit. 12, reg. 43 (Friedberg II, col. 1123); cf. reg. 72 (Friedberg II, col. 1124)]; tum quia quidquid est causa causae est causa causati secundum Proclum [cf. *Auctoritates Aristotelis*, ed. Hamesse, p. 231, 3 derived from *Liber de causis*, I, 16 (Pattin, p. 137, 57–58)], et per consequens iudex qui esset scienter causa commissionis ex qua pendet ipso sciente iniusta damnatio innocentis esset etiam scienter causa illius iniustae damnationis; tum quia omnis actus bonus vel malus imputatur magis esse praecipienti quam esse oboedienti, sicut hic docet Philosophus, quare quantumcumque iniustam condemnationem ferre per se ipsum est illicitum iudici, ferre etiam per alterum illicitum erit ei. Sed iudici est illicitum condemnare innocentem per se ipsum, [...] quare etiam est ei illicitum condemnare per commissarium.”

³⁴ *Ibidem*: “In speciali autem, ut videatur quid habet et debet facere iudex, distinguo de iudice, quia vel habet superiorem in terris vel non. Si habet, consulo quod causam remittat superiori cum relatione propriae scientiae et probationis oppositae. Et si non admittatur remissio, sed ipse cogatur ferre sententiam, consulo quod pro veritate sententiet.”

The first thesis is supported by the following argumentation. If the judge to whom a superior commissioned an action is not able to accomplish it in a proper way, he should refer to his superior. It may be that the judge who is to examine a case in which his knowledge opposes the evidence and testimonies is not able to act in a proper manner because he either, judging according to the evidence and testimonies, violates justice, or, judging according to his own knowledge, violates the formal order of law.³⁵

The argument for the second thesis is also based on the distinction between the order of law and the object of law, that is, justice. Gerald first says that no one can be excused by a constraint coerced by his superior; one should prefer to die than act wrongly. Such situations, however, are not common. Usually, the judge simply hesitates in deciding what he should follow: his own knowledge or the prescripts of law. Gerald asserts, finally, that to act against the order of law is less evil than to act against its object — against justice itself. Moreover, to condemn an innocent is wrong due to the nature of the action, whereas to violate the order of law is wrong only due to the circumstances of the action. This opinion is in accord with the law that says: it is better to leave the deed of a criminal unpunished than to condemn an innocent person.³⁶

Third, earthly rulers must judge according to the truth, since they, who are like gods on earth (based on Ps 46:10: “dii fortes terrae vehementer elevati sunt in populos”), should imitate God in the way they act (Eph. 5:1: “estote imitatores Christi sicut filii carissimi”). God judges justly the entire world and all peoples in His truthfulness. The lofty position occupied by an earthly judge whose position is supreme guarantees the superiority of his evaluation of testimonies and evidence over these testimonies. Further, a supreme judge, who is

³⁵ *Ibidem*: “iste iudex non potest in tali casu sententiam convenienter ferre, quia si pro veritate sententiet, facit contra ordinem iustitiae qui non permittit aliquem non convictum damnare [...] [GRATIANUS, *Decretum*, II, causa 2, qu. 1, can. 20 (Friedberg I, col. 448); II, causa 30, qu. 5, can. 10 (Friedberg I, col. 1107)]. Si vero contra veritatem sententiet, facit contra rem iustitiae, quod est maius inconveniens quam facere contra ordinem iustitiae, sicut maius est peccatum ex genere quam peccatum ex circumstantia, [...] quare iudex in hoc casu debet causam suo superiori remittere.”

³⁶ *Ibidem* (f. 115rb): “protestato, quod nullus debet se repugnare coactum ad male agere, quia in quibusdam non est cogi, sed praemorandum est, antequam aliquis turpiter agat [...]. Supposito tamen quod iudex metu vel ignorantia reputet se coactum ad dandum sententiam in hoc casu, ostendo quod debeat sententiarum pro veritate, quia de duobus malis minus malum est eligendum, si oporteat alterum eligi, ut habetur III *Topicorum* [2, 117a7]. Sed minus malum est contra ordinem iuris pro veritate innocentem absolvere quam servato ordine iuris contra veritatem innocentem condemnare, quod apparet tum quia ibi perit res iustitiae, hic autem solus ordo iustitiae; tum quia illud est secundum se malum ex genere, ut ostensum est supra, quod nullo modo potest benefieri, istud autem est malum ex sola circumstantia; tum quia ut dicit lex: ‘sanctius est impunitum relinquere facinus nocentis quam innocentem damnare’” [*Digesta*, XLVIII, tit. 19, fr. 5].

an upholder of justice, is able to judge testimonies and condemn false witnesses notwithstanding their number. No appeal can be lodged against his sentence.³⁷

Gerald's question ends with a series of answers to the objections raised at its beginning. First, he affirms that the judge is not always obliged to pronounce a sentence exclusively according to the knowledge he acquires in court as judge, especially in cases in which the justice of a sentence is in jeopardy. Let us take, for example, a case in which one party presents some evidence and the other none, but the judge has obtained some knowledge in the course of his scholarly studies that could serve as evidence for the party that provided no testimony. If the judge did not take his knowledge into account, his sentence would be unjust. Moreover, Gerald says that the comparison between the knowledge of the judge as judge and not as judge must be made *ceteris paribus*, that is, assuming that both are true. This condition is not fulfilled when the official knowledge of the judge as judge is false and his private knowledge true. In such a case, the judge must follow his private knowledge if he wishes to be in accord with Isaiah (5:20): "Vae qui dicitis malum bonum et bonum malum."³⁸

Against the second objection, Gerald argues that the judge judges as he hears when what he hears is true, otherwise, he must first verify what he hears and then judge. This is also clear from the remaining part of the quoted *auctoritas* that was not cited in the argument.³⁹

³⁷ *Ibidem* (f. 115rb–va): "ille qui est quasi Deus in terris debet, quantum potest, sicut Deus iudicare in terris, tali namque principi maxime iniungitur illud quod generaliter fideius indicitur: 'Estote imitatores Dei sicut filii carissimi,' Eph. 5. Sed talis princeps qui non habet superiorem in terris est quasi Deus in terris. Sic enim vocatur in Scriptura divina et ipse et sui similes, ubi dicitur quod dii fortes terrae vehementer elevati sunt in populos. Deus autem semper iudicat in veritate et puritate sibi nota. Scriptum est enim quod Deus iudicabit orbem terrae in aequitate et populos in veritate sua, id est sibi nota, quare simili modo huiusmodi princeps iudicare tenetur. Secundo, quia unusquisque iudicare tenetur secundum veritatem sufficienter sibi notam. Unusquisque enim iudicat bene quae novit et horum est bonus iudex [...]. Sed tali principi est sufficienter veritas nota posito quod ei soli sit nota, quia ipse solus magis est dignus fide quam centum testes. Quod apparet, tum quia ipse est custos supremus iusti [...], et per appellationem non est recursus ad alium; tum quia testimonium quod esset invalidum ex defectu numeri testium sit validum ex sola praesentia principis."

³⁸ *Ibidem*, ad 1 (f. 115va): „si alicui iudici datur sententiam fiant allegationes pro parte ius non habente et nullae allegationes fiant pro altera, ipse tamen scit allegationes veras pro parte ius habente quas didicit non iudex, sed scholaris existens. Si bene quidem iudicet, obsequendo legibus non adversando, examinando causae merita non imitando [...], iudicabit certe secundum veram legum notitiam quam didicit ut scholaris, non secundum falsam quam accepit ut iudex. [...] Si notitia quam iudex habet ut iudex praeferenda sit notitiae quam habet ut persona privata, concedendum est ceteris paribus. Sed si notitia illa non meretur dici notitia, sed error et deceptio, quia falsa et iniqua, ista vero sit vera et certa, nemo sanae mentis dicet, quod illa isti sit praeferenda et illi quidem, qui hoc dicerent, maledicti sunt a Deo dicente: 'Vae qui dicitis malum bonum et bonum malum, ponentes tenebras lucem et lucem tenebras,' Is. 5."

³⁹ *Ibidem*, ad 2 (f. 115va).

The third objection is not valid because the rule concerning excommunication and the rule that forbids the judge to condemn an innocent are grounded in different laws. The former is grounded in a positive law that allows exceptions, and the latter is based in natural law, which does not allow exceptions, as the *Decretum* confirms.⁴⁰

The fourth counter-argument repeats that no law prescribes the condemnation of an innocent on false evidence, which is also corroborated by the Bible (Deut. 17:4): “Si crimen audiens diligenter inquisieris et verum esse reperieris, tunc educes.”

Commenting on the fifth objection, Gerald confirms that the common good should be preferred to the particular, but the common evil, consisting in falsity, is not to be preferred over the good, consisting in true piety.

The sixth objection has already been resolved by saying that it is less evil to violate the order of law than to judge against the truth and in violation of justice, and that a scandal is more acceptable than abandoning the truth, especially because scandals of this kind happen very infrequently.⁴¹

* * *

Gerald's position is clearly opposed to that of Thomas. Gerald is a robust supporter of judging according to the truth, notwithstanding the source from which it flows. This is not the only difference distinguishing Gerald from Aquinas. As it has been mentioned above, for Aquinas, the principal context of the question was a kind of *Streit der Fakultäten*, in which one side — those who advocate judging according to testimonies and evidence — is represented by jurists, and the other side is represented by theologians and philosophers. The same is true of Gerald but, unlike Aquinas, he sides with the theologians against the jurists. For him, the Bible and Aristotle (that is, great authorities) serve as the principal tools in solving the problem. However, the internal development of the question shows that it is immersed in a judicial context. The problem of referring dubious cases to judges of higher rank, which is not merely theoretical but developed out of court practice, is certainly judicial in its perspective. In spite of that, Gerald tries to resolve it by means of theological and philosophical arguments that are universal in nature. Thus, the Doctor Moralis tries to put the jurists' concern for justice into a broader context determined by theology and philosophy. He demonstrates that what theology and philosophy say is not incompatible with the law, if rightly interpreted.

⁴⁰ GERALDUS ODONIS, *Expositio*, V, 19, ad 3 (f. 115va); GRATIANUS, *Decretum*, I, dist. 4, can. 1 (Friedberg I, p. 5, 27).

⁴¹ GERALDUS ODONIS, *Expositio*, V, 19, ad 4 – ad 6 (f. 115va–vb).

The foregoing remarks about jurists being Gerald's principal antagonists do not imply that Gerald ignores Aquinas' position completely. The doctrine ascribed by Gerald to the jurists includes Aquinas' principal argument, but — and this is consistent throughout Gerald's *Commentary*⁴² — the *Summa* is not quoted directly.

3. PAUL OF WORCZYN

Let us now turn back to the thinker who first drew our attention to the problem analyzed here: Paul of Worczyn. As noted, Paul is strongly dependent on earlier masters. Direct quotations and easily recognizable paraphrases account for at least 90 percent of Paul's question. After a short introductory paragraph in which he explains the problem and identifies the various standpoints in the discussion, Paul presents a series of nine arguments for the truth as the proper basis for judging. These arguments stem either from Aquinas (arg. 1–4 = STh, II–II, 67, 2, 1–4) or from the *corpus* of Gerald's question (Paul's arg. 5–8, which include also Gerald's principal argument based on Exodus 23:2), except for the last argument, which uses Jesus' trial before Pilate as the prime example of a case in which the sentence was grounded on false testimonies. This case is paralleled by the case of the biblical Susannah, who was condemned on false testimonies.⁴³ Then come arguments for evidence and testimonies as the only legitimate bases for a sentence. All of these are rooted in Gerald's question, except for the first one, which says that the authority of Thomas and the jurists supports judging in accordance with the evidence and testimonies.

The *corpus* of Paul's questions repeats that of Aquinas, but the distinction between sure and merely probable knowledge of the judge, as formulated by Gerald, is added.

Next, Paul answers both series of arguments. The solutions to the first four arguments for the truth are also borrowed from Aquinas' *Summa*. The rest, save for the last, are answered in Thomas' spirit, asserting that the judge cannot act legally in any other way than *as a judge*. The last objection is acknowledged: Paul

⁴² Cf. C. PORTER, *Gerald Odonis' Commentary*, p. 246, confirms, following the opinions of other scholars specialized in Gerald's *Commentary on the Nicomachean Ethics*, that Gerald did not expressly cite authors who flourished after the 12th century.

⁴³ PAULUS DE WORCZYN, *Commentarius*, V, 40 (f. 140vb): „Iudaei et Pilatus et iudices de Zuzanna essent excusati, quia Pilatus iudicavit secundum allegata et probata, quia cum ipse audivit multitudinem clamantem: 'reus est mortis', dixit ad Iesum: 'audis quanta contra te dicunt?', et sic iudicavit secundum etc.”

contends that Pilate and the Jews cannot be excused.⁴⁴ The counter-arguments of the series for the evidence and testimonies are borrowed from Gerald's text.

Paul's question ends with two *dubia*, the first one trying to evaluate both quoted opinions and the second commenting on the practice of referring dubious cases to a superior judge. Paul here abbreviates Gerald's Advice, presented as the second part of his question. Paul's answer to the main question is brief: he says that, until a better solution occurs, it will probably be better to judge according to the truth than against it.⁴⁵ Together with a reference to the sentence pronounced by Pilate, these two elements are Paul's only original contribution to the question.

4. CONCLUDING REMARKS

The core of the discussion between Aquinas and Gerald — and, simultaneously, the crux of the problem examined here — has been adequately expressed by the opposition of *ordo iustitiae* and *res iustitiae*, as formulated by the Doctor Moralis. Gerald's distinction corresponds to Delanglade's juxtaposition of legalist and anti-legalist conceptions. In brief, Thomas argues that *res iustitiae* cannot be separated from *ordo iustitiae* and that respect for *ordo iustitiae* is the most certain way to assure *res iustitiae*. Now, in the issue under consideration, *ordo iustitiae* requires the judge to follow the testimonies and evidence provided in court as opposed to his own private opinion. The private opinion of the judge is at odds with the public character of his office and endangers the equity of his sentence. Meanwhile, Gerald holds that *ordo iustitiae* should be subordinated to *res iustitiae*; it is the judge that determines their relationship and, if, necessary violates court procedures to preserve justice. In other words, Gerald opts for broader prerogatives for the judge who, as a guardian of justice, is permitted to reject testimonies and evidence that are provided *lege artis* from the formal point of view. Thus, in the *Streit der Fakultäten*, Gerald subordinates jurisprudence to theology and philosophy. To him, in dubious cases, the ultimate court of appeal is the Bible and the *Nicomachean Ethics*, and not Gratian's *Decretum*. Moreover, the interpretation of law commonly shared by jurists can effectively be objected to by an interpretation formulated from outside, that is, by theologians and philosophers. By contrast, Aquinas adopts general philosophical assumptions to defend the autonomy of law and judges, who, in his conception, are obliged to act in a strictly-determined way in the public sphere that

⁴⁴ *Ibidem*: „Pilatus et Iudaei non possunt excusari, quia non solum illis fuit veritas, sed etiam aliis, et ideo non excusatur.”

⁴⁵ *Ibidem* (f. 141ra): „Respondetur, salvo iudicio meliori, quod probabilius est in tali casu iudicare secundum veritatem quam contra veritatem.”

excludes their private convictions as inconsistent with the public nature of their profession. Consequently, according to Saint Thomas, there is no winner in the *Streit*.

As we have already seen, Paul's question can be described with sympathy as a collage of thoughts borrowed from his predecessors. Therefore, his intervention in the discussion brought hardly any new elements to it. Despite that, it is remarkable because it enables the introduction of a diachronic element into our understanding of the scholastic dispute. The controversy between Thomas and Gerald can be seen as a timeless conflict of two ideals of the functioning of the court, the judge, and law, to which Paul adds his own evaluation from the perspective of the following century. His text indicates that Gerald's position gained, in time, a slight advantage over that of Thomas, since, although Paul did not criticize Aquinas' standpoint openly, he gave the last word in the discussion to Gerald. This means that confidence in judges as guardians of *res iustitiae* allowed to modify its *ordo* expanded over the years, at least in the philosophical milieu in Cracow. As legal historians demonstrate,⁴⁶ the afterlife in modernity of the question debated by Thomas, Gerald and Paul had many facets. On the one hand, the revival of Thomas' thought in 16th and 17th-century scholasticism contributed to the popularity of his solution, for instance in the works of Thomas de Vio, Domingo de Soto and Francisco Suárez. On the other hand, the jurists (Leonard Lessius, Tiberius Deciani, Ioannes Valeri) introduced many new elements and subtle interpretations of the maxim *iudex debet iudicare secundum allegata et probata*. Although they focused on instances in which this maxim's validity is limited, such as when sentencing someone to death, they acknowledged its basic validity. This is the opinion that persists in contemporary law.

⁴⁶ See the literature quoted above, in note 3. See also, e.g., MICHELE PIFFERI, *Generalia delictorum. Il Tractatus criminalis di Tiberio Deciani e la parte generale di diritto penale* (Per la storia del pensiero giuridico moderno, 66), Milano 2006, (commentary to the maxim) pp. 340sqq.

SECUNDUM PROBATA CZY SECUNDUM VERITATEM?
UWAGI NA MARGINESIE LEKTURY KOMENTARZA
DO ETYKI NIKOMACHEJSKIEJ PAWŁA Z WORCZYNA
(KSIĘGA V, KWESTIA 40)

S T R E S Z C Z E N I E

Paweł z Worczyna, profesor Uniwersytetu Krakowskiego, czynny w pierwszych dekadach XV w., w swoim *Komentarzu* rozpatruje zagadnienie, czy sędzia powinien kierować się przy ferowaniu wyroku przedstawionymi w trakcie procesu dowodami, czy znaną sobie skądinąd prawdą. Analiza źródeł, na których oparł swoje rozważania Paweł, wskazuje jako protagonistów sporu Tomasza z Akwinu, który opowiadał się za dowodami jako podstawą wyroku, oraz Geralda Odonisa, który wskazywał na bezwarunkową konieczność kierowania się prawdą. Argumentacja Tomasza opiera się na założeniu, że wszelkie czynności, jakie sędzia podejmuje w trakcie procesu, podejmuje jako osoba publiczna, a nie prywatna, toteż nie może w sądzie brać pod uwagę faktów znanych mu, ale nie przedstawionych w sądzie. W ten sposób Tomasz broni instytucję sądownictwa przed zarzutem arbitralności wydawanych wyroków. Gerald natomiast zwraca uwagę na konieczność odróżnienia w działaniach prawnych porządku prawnego (*ordo iustitiae*) od samej sprawiedliwości (*res iustitiae*) oraz podporządkowania respektu dla ładu prawnego realizacji samej sprawiedliwości. Tam, gdzie porządek prawny kłóci się ze sprawiedliwością, musi jej ulec, co oznacza w praktyce, że sędzia musi bronić niewinnie oskarżonego, nawet jeżeli przemawiają przeciw niemu przedstawione w trakcie sprawy dowody. Paweł z Worczyna, zrelacjonawszy wiernie opozycyjne stanowiska, zdaje się lekko przychylić do zdania Geralda Odonisa.

KEYWORDS: Thomas Aquinas, Geraldus Odonis, Paul of Worczyn, judge, sentence, judicial proceeding, trial

SŁOWA KLUCZE: Tomasz z Akwinu, Geraldus Odonis, Paweł z Worczyna, sędzia, wyrok, postępowanie dowodowe